Supreme Court, U.S.
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No. 99-375

In The
Supreme Court of the United States

STEVE EDWARD ROACH,
Petitioner,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

REPLY TO RESPONDENT'S OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Virginia Code § 16.1-260 *et seq* 1

THIS IS A CAPITAL CASE[1]

Steve Edward Roach, under sentence of death for a crime he confessed to having committed when he was 17 years old, has petitioned this Court for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit, seeking review and reversal of that court's decision denying him federal habeas corpus relief. The Attorney General of Virginia on September 23, 1999, submitted his opposition to that petition, and it is to that opposition that Petitioner now replies.

Introduction

The Commonwealth denies that Petitioner's constitutional rights have in any way been violated, although he was sentenced to die under a "future dangerousness" aggravator despite having had no record of violence against another human being until the murder for which he was condemned. With respect to each of the five reasons Petitioner presented to this Court for granting the writ, Respondent addresses a number of arguments not raised by Petitioner, and all but ignores those that he does raise.

For all of the reasons stated in the original Petition, as well as for those presented in reply to Respondent in these pages, the writ of certiorari should issue.

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[1] In his opening submission to this Court, Petition for a Writ of Certiorari ("Cert. Pet."), at pp. 1-2, Petitioner noted that an issue of State law has recently arisen that caused the Supreme Court of Virginia to stay his execution, and to permit an appeal to that court from a denial of relief by the trial court in Greene County. The issue concerns the proper interpretation of the provisions of the Virginia statute, Va. Code § 16.1-260 *et seq.*, according to which both parents of a juvenile defendant must be notified of his proposed transfer to a court of record for trial. Undersigned counsel hereby inform this Court that oral argument was held before the Virginia Supreme Court in Richmond, on September 15, 1999. If that court follows its regular procedures, a decision is to be expected on or about November 5, 1999. The stay of Petitioner's execution will remain in effect until resolution of the case on the merits by the Virginia Supreme Court.

QUESTION 1: PROPORTIONALITY

Petitioner contends that his sentence of death cannot be sustained under a proportionality review conducted according to elementary considerations of due process. This follows from the fact that a proportionality analysis – at least as that process is delineated by Virginia statute – is limited to the consideration of two elements: the defendant's demonstrated propensity to commit violent acts, and the nature of the capital crime itself. On both of those measures, a court charged by law with conducting a proportionality review in a manner consistent with due process cannot have come to the conclusion that the Virginia Supreme Court arrived at here. The record unequivocally shows that no defendant has been sentenced to death on the basis of future dangerousness in Virginia, since the restoration of the death penalty in 1976, (1) whose record of violence against persons has been less than that of Petitioner Steve Roach, and (2) whose crime – however reprehensible and heinous – involved no violence beyond that which was necessary to accomplish its terrible goal.

Respondent attributes to Petitioner the argument that "the Virginia Supreme Court misapplied *Virginia* law in conducting its 'proportionality review' of his death sentence." Brief in Opposition to Petition for Writ of Certiorari ("Op. Cert."), at pp. 6-7 (emphasis in original) (footnote omitted). But Petitioner has indicated from the outset his awareness of the limitations imposed by this Court's teachings in *Pulley v. Harris*, 465 U.S. 37 (1984). He has never contended that a failure of the highest court of the Commonwealth to apply State law correctly would entitle him to a claim under the United States Constitution. Petitioner does not ask this Court to assess the Virginia court's application of Virginia law.

Petitioner's argument, to which Respondent does not direct a substantial portion of his rebuttal, immediately concedes that "States are not obligated to assess the proportionality of death sentences." Cert. Pet., at p. 6. But

that is not the point; which is, rather, that however States choose to assay the fairness and equity of capital sentencing, those methods must comport with due process principles.

For this proposition, Petitioner cites this Court's decision in *Evitts v. Lucey*, 469 U.S. 387, 401 (1985). This Court held, in that opinion, that even when a State acts in an area in which it has the greatest and freest discretion to determine outcomes under principles of federalism, "it must nonetheless act in accord with the dictates of the Constitution – and, in particular, in accord with the Due Process Clause." *Id.*

Respondent now says that **whatever** method a State may choose with the intention of "narrowing the class of defendants eligible for the death penalty" will be sufficient: so long as "narrowing" has occurred (or may in principle occur), the Constitution is satisfied, and this Court as guardian of the Constitution has no role to play. But that is not the law. Petitioner submits not that *Evitts* "permits a federal court to review the state-law mandated proportionality review," Op. Cert., at p. 10, but rather that *Evitts* requires discretionary functions carried out by States to conform to the requirements of the Constitution. There is a world of difference.

The Supreme Court of Virginia surely **said** that it had compared Roach with similarly-situated defendants, and his offense to similar crimes, and stated its conclusion that "while there are exceptions, juries in this Commonwealth generally impose the death sentence for crimes comparable or similar to Roach's murder of Mrs. Hughes." *Roach v. Commonwealth*, 468 S.E.2d 98, 114 (Va. 1996), *cert. den.*, 519 U.S. 951 (1996); Cert. Pet., at p. 58a. And that court even identified at least some of the cases that it canvassed in order to substantiate its generalization. The problem is simply that the cases cannot be read that way: it is impossible, even based on the decisions that the Virginia Supreme Court itself **said** it had reviewed, to conclude that juries in Virginia "generally" would sentence a Steve Roach – 17 years old, with no record of criminal

violence, and who had confessed to a one-gunshot murder – to death by lethal injection.[2]

A proportionality analysis must restrain itself to considering the defendant and the crime in comparison to others. His violent record, and the awfulness of his act, must be quantifiable in some meaningful if loose way, for proportionality review to make sense. And if a case presents values "off the charts" – that is, less than or equal to the next lowest value recorded in any prior case – on each measured criterion, then that sentence cannot be said to be "proportional" to others. That is not to say that no argument of principle or policy may be constructed in defense of the sentence meted out to this defendant. It requires only the conclusion that the sentence cannot be defended on grounds of proportionality. To sustain the sentence on the grounds of another justification despite its obvious lack of proportionality, or to excuse an evident absence of proportionality by appeal to other goals however defensible on their own, is to deny due process of law to an individual who has an entitlement to a particular kind of review of his sentence before it is carried out.

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[2] The Virginia court **said** it had considered as "similar" some 16 cases involving robberies in which it had affirmed death sentences on the grounds of future dangerousness. Those were cases that the court had previously compiled in *Yeatts v. Commonwealth*, 410 S.E.2d 254, 267-68 (1992), and in *Chichester v. Commonwealth*, 448 S.E.2d 638, 652 (1994), *cert. den.*, 115 S. Ct. 1134 (1995). Two additional capital sentences in "similar" cases had been affirmed after *Chichester*, but before *Roach*: *Chandler v. Commonwealth*, 455 S.E.2d 219, *cert. den.*, 116 S. Ct. 233 (1995), and *Joseph v. Commonwealth*, 452 S.E.2d 862 (1995). The court **said** it was also taking into account "capital murder cases in which robbery was the underlying offense and a sentence of life imprisonment was imposed," but it gave no clue as to which those cases might have been. Counsel for Petitioner presented to the circuit court below a comparative analysis of all 58 decided cases that seem to have met these criteria, but the court did not make reference to any of them in its decision, concluding only that it had no right to "look behind" what the Supreme Court of Virginia had concluded. Cert. Pet., at p. 11a. Petitioner submits that the Constitution requires this very "look."

Petitioner's submission is therefore not that he is entitled to proportionality review under federal law, an outcome precluded by *Pulley*. Nor is his challenge to an incorrect application of State law, which is not reviewable by this Court. His contention is that the State court did not do what it acknowledged that it had to do. The State court did not conduct an **incorrect** analysis of proportionality, perhaps erring by assigning too much importance to this precedent and too little to that. Petitioner submits that the Virginia Supreme Court, no matter what it **said** it had done, did not conduct a proportionality review at all.

Respondent professes to find this result foreclosed by the decision of this Court in *Walton v. Arizona*, 497 U.S. 639 (1990). But those parts of Justice White's decision in *Walton* representing the views of the Court stand for no such thing. In *Walton*, the petitioner challenged his sentencing under an "especially heinous, cruel, or depraved" aggravator (similar to the "vileness" aggravator in Virginia, which did not go to the jury in this case). This Court noted that the aggravating factor had been carefully defined by the Arizona Supreme Court, which had "sought to give substance to [its] operative terms." 497 U.S. at 654. Heinousness had "been construed by the Arizona courts in a manner that furnished sufficient guidance to the sentencer." 497 U.S. at 655.

On this basis, this Court observed that "[t]he Arizona Supreme Court plainly undertook its proportionality review in good faith." 497 U.S. at 656. When from those premises the Court arrived at the result that "[t]he Constitution does not require us to look behind that conclusion," *id.*, it was not saying that **any** pronouncement of a State supreme court will be opaque to this Court's scrutiny, but merely that the Arizona proceedings actually considered in *Walton* passed constitutional muster. That proposition cannot be stretched to the extent that the Commonwealth would have this Court do now.

For the very reasons discussed in *Walton*, the "proportionality analysis" of the Virginia Supreme Court was not erroneous, it was non-existent. *Walton* does not address such a situation, and surely it does not slam the door of the courthouse in the face of someone condemned to death in violation of due process. The so-called proportionality analysis of the Virginia Supreme Court was constitutionally defective, within *Evitts*, and should now be set aside.[3]

QUESTION 2: FUTURE DANGEROUSNESS

Petitioner Roach does not "merely disagree[] with the jury," and with the reviewing courts, as to the sufficiency of the evidence of his future dangerousness, as Respondent would have it. Op. Cert., at p. 12. Rather, his contention is that, since the future dangerousness aggravator is intended to restrict the universe of persons eligible for the ultimate punishment – even after conviction of terrible offenses – there must be a constitutional standard by which that restrictive effect may be measured. If the prosecutor may seek the death penalty even against a defendant like Steve Roach, aged 17 and without an appreciable criminal record, then the future dangerousness hurdle is set so low as to be meaningless.

This Court has upheld special issues, or aggravators, submitted to juries in capital cases, ever since its decision in *Jurek v. Texas*, 428 U.S. 262 (1976). It has held them to be reasonable bases for channeling juries' discretion, and for permitting juries to make distinctions between those defendants deserving to die and those who should be permitted to live despite having committed awful acts.

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[3] That a State may provide **greater** benefits than those constitutionally required, and may not be challenged in federal court for doing so erroneously – *Pennsylvania v. Finley*, 481 U.S. 551, 557-59, *see* Op. Cert., at p. 10 – is clearly of no relevance here. Petitioner would be quite content with a proportionality review according to minimum federal constitutional standards of due process, and asks for no special concession provided by either the Legislature or the courts of the Commonwealth of Virginia.

Even if future dangerousness may be inferred from the mere facts of the capital crime itself – a proposition that the Commonwealth says that is "contrary to Petitioner's erroneous assertion," Op. Cert., at p. 11, n. 2, but that he actually has never contested – there is simply no basis for that extraordinary inference here. The killing of Mary Hughes was a terrible thing, the magnitude of which no one wishes to diminish, but it was committed without any of the usual indicia of future dangerousness.

There was nothing about the crime itself that would indicate, simply as a matter of logic, any future threat to society on the part of its perpetrator. It was, indeed, a shooting at point-blank range, and it is true that Ms. Hughes was a person who had shown dedication to Petitioner, which he had regularly reciprocated.[4] It is true that he stole her money and her car. The Commonwealth, and the court below, seem to find in those facts sufficient basis for moral outrage to justify the capital sentence in this case. But Petitioner respectfully submits that moral outrage is not the issue before this Court: compliance with constitutional standards is. The relationship between Petitioner and his victim is not relevant to his potential dangerousness absent evidence of his treatment of others close to him. And no witness at trial – surely no one proffered by the Commonwealth – testified that he was in fact likely to harm another individual, much less another friend. He had had no record of such behavior, and no one testified that this single event, however inhuman and inexplicable, indicated a change in his personality of that magnitude.

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[4] Indeed, the trial judge withdrew the "vileness" aggravator from the jury, over the Commonwealth's objection. This alone is enough to distinguish this case from *Murphy v. Commonwealth*, 431 S.E.2d 48 (Va.), *cert. den.*, 510 U.S. 928 (1993), upon which the Attorney General relies. *See* Op. Cert., at p. 11, n. 2. It may be that the defendant in *Murphy* had no criminal record, but in that case, three different aggravating circumstances – murder for hire (carried out with deliberate and apparently elaborate planning), vileness, and future dangerousness – were **all** found to be present.

QUESTION 3: THE ALTERNATIVE TO DEATH

Petitioner made the argument in his opening submission that this is is the case anticipated by Justice Stevens and three other Justices in *Brown v. Texas*, 118 S. Ct. 355 (1997) (*mem. respecting denial of cert.*). He suggested that in this case, as in *Brown*, not informing the members of the sentencing jury of certain truths of which only they – among all of those in the courtroom – were ignorant, is "perverse," and "unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." 118 S. Ct. at 356.

Respondent limits his opposition on this point to the tired and predictable contention that Petitioner is advocating a "new rule," precluded under *Teague v. Lane*, 489 U.S. 288 (1984). Op. Cert., at pp. 12-14. But that some courts, including the Fourth Circuit, have regularly erred in understanding this Court's teaching in *Simmons v. South Carolina*, 512 U.S. 154 (1994), does not make the correct interpretation a "new rule." *O'Dell v. Netherland*, 521 U.S. 151 (1997) is obviously inapposite: Petitioner need not and does not argue that *Simmons* itself was not a "new rule." Roach, unlike O'Dell, of course, was tried after *Simmons* was decided.

In *Simmons* itself, Justice Blackmun wrote: "It can hardly be questioned that most juries lack accurate information about the precise meaning of 'life imprisonment' as defined by the States." 512 U.S. at 169 (opinion of Blackmun, J.). In the context of a determination of hypothetical or conditional, as opposed to future, dangerousness therefore, it is as clear as can be that outcomes are determined on the basis of comprehension of the premises. It literally makes no sense to ask jurors whether a convicted defendant "would" be a future danger to society without positing the premises of the conditional voice: "would" he be a danger on what assumption? If the premise itself is undetermined, then the jury should be advised that any assumption it makes is necessarily speculative; but if the premise is known, either as a

matter of law (as in South Carolina at the time of Simmons's trial, or as in Virginia now), or as a matter of fact, then withholding that information from the jury is entirely wrong.

The jurors deciding whether Steve Roach "would" be a future danger to society needed to know that there was literally no chance that he could walk free in society in less than 25 years. Since they were not told this truth, they asked the trial judge to explain to them the term "life" imprisonment: the very term Justice Blackmun for a Court plurality acknowledged that most jurors do not understand. This was important not only for the members of the jury to appreciate the consequences of their decision, but for them to be able to answer the question before them according to their oaths.

The simple truth, anticipated by Justice Souter in *Graham v. Collins*, 506 U.S. 461, 518 n. 10 (Souter, J., dissenting), seen by a majority of the Court in *Simmons*, and capsulized by four Justices in *Brown*, is that questions of "future dangerousness" do not rise even to the level of speculation if the premise of the conditional question is not provided. They ask for counterfactual imagining, for unreality. They do not provide the guidance in the invocation of the ultimate penalty that this Court has consistently held since 1976 to be a bastion of constitutional dimension.

QUESTION 4: JURY DISSENSION

Respondent makes no argument at all on the merits to address Petitioner's submission regarding jury unanimity. Petitioner has argued that the judge's instruction directing them that they had to be unanimous to impose a sentence of either life or death – plainly incorrect under Virginia law – had the effect of putting on any juror who might have favored a sentence of life an unacceptable pressure to conform to the majority. This is tantamount to imposing on a criminal defendant the obligation to persuade all of his jurors of the existence of a premise in mitigation of his sentence, which is

unconstitutional under *Mills v. Maryland*, 486 U.S. 367 (1988) and *McKoy v. North Carolina*, 494 U.S. 433 (1990).

This Court concluded in its decision last Term, in *Jones v. United States*, 119 S. Ct. 2090 (1999), that erroneous instructions regarding jury unanimity were not fatal to the sentence in that case precisely because "there is no reasonable likelihood that the jury applied the instructions incorrectly." 119 S. Ct. at 2103. Here, by contrast, there is every reason to believe that incorrect understanding is just what happened, especially given the jury's question concerning the meaning of life imprisonment. The trial judge effectively told any juror holding out for a non-capital sentence that she might as well give up. That error may well cost Petitioner his life.

QUESTION 5: RIGHTS OF YOUNG DEFENDANTS

If a juvenile defendant has a constitutional right to an "individualized consideration" of his capacity for legal culpability, *see Stanford v. Kentucky*, 492 U.S. 361, 375 (1989), before he may be required to be tried as an adult, then the Virginia transfer scheme in force at the time of Petitioner's trial was unconstitutional.

The Commonwealth's entire argument here is that Petitioner misreads *Stanford*. Op. Cert., at pp. 15-17. But it is Respondent who errs in his understanding of this Court's precedents: Petitioner's view of *Stanford* is entirely consistent with the teaching of this Court in such cases as *In re Gault*, 387 U.S. 1 (1967), with respect to the special place reserved for children in our legal system.

CONCLUSION

For all of the foregoing reasons, as well as for those set out in the Petition herein, the writ of certiorari should be granted.

Respectfully submitted,

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